Appeal No. UKEAT/0256/14/MC
UKEAT/0257/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 10 February 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

UKEAT/0256/14/MC

MRS K HALL — APPELLANT

DURHAM COUNTY COUNCIL & OTHERS — RESPONDENTS

UKEAT/0257/14/MC

(1) DURHAM COUNTY COUNCIL — APPELLANTS
(2) GOVERNORS OF WEST CORNFORTH PRIMARY SCHOOL

MRS K HALL — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING (UKEAT/0256/14/MC)
PRELIMINARY HEARING – ALL PARTIES (UKEAT/0257/14/MC)

APPEARANCES

For Mrs K Hall	MR JAMIE ANDERSON (of Counsel) Instructed by: Askews Solicitors 4-6 West Terrace Redcar Cleveland TS10 3BX
For Durham County Council and The Governors of West Cornforth Primary School	MR SAM HEALY (of Counsel) Instructed by: Durham County Council Legal Services Division County Hall Durham DH1 5UL

SUMMARY

UNFAIR DISMISSAL - Compensation

The Claimant was a teacher who had realistically entertained high hopes of promotion to a Headship, but who as a result of the behaviour of the Respondent Education Authority and School Governors towards her would never now work again as a teacher. She appealed that an award of compensation to her was "grossed up" from an intended net figure to allow for the impact of taxation on the overall award not by asking what sum it was necessary to pay to her such that after it had been taxed the net figure would remain, but instead by asking what tax was payable on a sum equal to the net figure, and paying her that sum in addition to the net, all of which would then be subject to tax. The result of the latter approach (which the Employment Tribunal adopted) was erroneously to lower the sum payable to the Claimant to a level below that of the net the Employment Tribunal had decided she should be entitled. The appeal was allowed: the wrong approach had been adopted.

At the same time, a Preliminary Hearing was held in an appeal by the Respondents, raising a number of complaints about the assessment of the award at both an adjourned Review Hearing and a subsequent hearing held to reconsider aspects of the compensation awarded at the Review Hearing. All complaints were rejected, except for two, which were thought arguable at a Full Hearing of the Appeal Tribunal: the Respondents' argument that to assess the chance of the Claimant becoming a Head at 100% was manifestly excessive, and clearly took no proper account of the chances, and that the multiplier used in assessing the sum by way of pension already accrued in service by the Claimant was too high, since the Employment Tribunal had wrongly assumed that it would have been payable for the first time at age 65, whereas it was payable without reduction from the age of 60.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. In this case between a former teacher and her former employer, two Decisions of an Employment Tribunal at Newcastle fall for consideration. The Employment Tribunal, presided over by Employment Judge Rogerson and originally consisting of Mr Sanderson and Mrs Davison as well, though later only Mr Sanderson, dealt in 2008 with a claim by the Claimant which revealed an astonishing tale. It reflected very little credit on the Local Authority or the management of the school in which she was employed. After 2008 the tale continued. It is one of the career of a promising, able and keen teacher effectively being destroyed by what had happened to her.

2. It began with a complaint that she had been assaulted by the Head Teacher of the school at which she taught in March 2004. A complaint as to that treatment was thereafter treated inappropriately by both an officer of the Local Authority and by the Chair of the Governors.

3. The case was decided in favour of the Claimant in May 2008. A Remedies Hearing followed later: in a Decision of December 2008, compensation was assessed expressly upon the basis that the Respondent would accept and adopt any recommendations which the Tribunal made. The Respondent had invited them. The Tribunal therefore made its assessment upon the basis that the Respondent assured it that the Claimant would retain a post of responsibility as Literacy Leader at the school.

4. The assurance was not honoured. In August 2009 there was a redundancy at the school. The Tribunal subsequently found that the Claimant, who was selected for that redundancy, would not have been dismissed for that reason if the Respondent had retained her in post as

Literacy Leader, as it had anticipated in the original Remedies Hearing that the Respondent would.

5. It determined at a Review Hearing in February 2011 that the consequences of the redundancy were attributable, causatively, to the original failings of the employer. Part of the Review Hearing was adjourned until November 2013. In Reasons of 23 December 2013, the Tribunal dealt extensively with the compensatory awards that were appropriate. This was a detailed Decision and is the first of the two that fall for direct consideration before me today. On 15 January 2014 both parties sought a reconsideration of this Decision.

6. I shall call the first Decision that I have to consider the "Review Decision" and the second, Reasons for which were given on 24 April 2014, the "Reconsideration Decision".

7. Broadly viewed, in the Review Decision the Tribunal made a considerable award to the Claimant: in total £945,754, some of which was not taxable, but of which £885,754 represented the net sum after tax. It had to ensure that the taxable sum it awarded would, after deduction of tax, be such as to leave the Claimant with the £885, 754 it had awarded. Accordingly it grossed up the sum, taking account of what it thought were the appropriate taxation bands. The total was just short of £1.4 million.

8. The Tribunal, having agreed to reconsider its Judgment, dealt with a number of arguments addressed to it by both parties about that Decision. It amended its Judgment in a number of respects. The total award came after that process to a sum just a little short of £1.25 million.

9. Both parties appealed. The first in time to appeal was the employer. The appeal, brought nominally against the Review Decision, came before Wilkie J in this Tribunal. Knowing that a decision on reconsideration was pending he determined that the matter should be set down for a Preliminary Hearing. There had been some 26 grounds of appeal, and he thought it likely that, following reconsideration, a number would fall by the wayside. Over 20, however, have remained, and that Preliminary Hearing has taken the bulk of the proceedings today.

10. The Claimant's appeal raised a discrete point as to the proper approach to be taken to calculating a sum when grossing up is applied. This is a full appeal.

11. The Claimant appears today by Mr Anderson. Mr Healy, who appears for the Respondent, has the advantage of having been counsel throughout for the Local Authority.

The Preliminary Hearing

12. Before dealing with the individual detail of each of the several grounds of appeal, I should make these observations. First, since this is a Preliminary Hearing, the test that I have to adopt is not what I for myself would decide on appeal, but whether a particular point is reasonably arguable. Secondly, an appeal lies only if there is an error of law in the Tribunal's reasoning. Subject only to perversity, it is not an error of law for a Tribunal to come to a conclusion on fact. Indeed, it is its job to decide fact. Next, where there is a hearing as to quantum, what matters is the central principle which the Tribunal is applying. The detail of an assessment in respect of compensation will only rarely and separately give rise to any question of legal principle.

13. The principles applicable to compensation were correctly identified in his Skeleton Argument by Mr Anderson as follows: (1) the basic principle is that the Claimant should be placed in the position that she would have been in had the unlawful treatment not occurred. That principle is not disputed by Mr Healy. (2) The determination of what would have been the position had the wrong not been done, may in some cases involve complicated issues of fact. But they have to be kept properly in their place. It is all too easy to focus so much upon some detail of what is one overall assessment that the argument loses sight of the wood because of the trees. An appeal court must be careful to avoid being persuaded that, because of some uncertainty in respect of some aspect of fact, there has been an error of law in the overall assessment.

14. Next (3), it is all too easy for a disappointed litigant to ask for reasons to be given for every finding of detail which a Tribunal makes. It is often heard in this Tribunal that a Tribunal did not sufficiently explain its reasoning on X or Y point which occurs. Yet it has to be remembered that a Tribunal Judgment is not likely to be the finest piece of legal draftmanship. The longer a Judgment and the more complex the facts, the easier it may be to point to some small infelicity. The question for me at this stage of an appeal is whether any such possible inelegance or minor lack of clarity gives rise to any real prospect of overturning a Judgment which must be read as a whole. The burden of proof, if relevant, does not apply separately on each and every item, but only in respect of the overall assessment of loss.

The Relevant Facts on Loss.

15. The Claimant became a teacher in 1994. For the first ten years she was subject to no criticism. The Tribunal regarded her (and there seems to have been no evidence to suggest the contrary) as a dedicated, committed, keen, intelligent, successful teacher who had the advantage

of a degree and who plainly aspired to promotion within the teaching profession. Compensation for what happened to her was initially assessed at the Remedy Hearing in 2008. But thereafter, in the circumstances I have described, the Claimant suffered not only disappointment and resentment at her dismissal by reason of redundancy but from a psychiatric condition.

16. A consultant psychiatrist was appointed by the parties acting jointly. He produced agreed medical evidence. His view was that from March 2004 until May 2009 the Claimant had, in consequence of her treatment, suffered from a chronic adjustment disorder with anxiety. Following her redundancy there was a marked change in her symptoms. She developed depression. She suffered from a major depressive disorder, a single episode of moderate severity. After May 2012 that left her with residual symptoms of both anxiety and depression amounting to an adjustment disorder with mixed anxiety and depressed mood. She described the symptoms, which were continuing, as significant and relating to anxiety and depression. Their effects would have extended across all areas of her life, work, leisure and home and would have affected her most when she felt most stressed. He thought that in July 2012 the Claimant would have been able to work again but in a job outside teaching and, significantly for the argument, one which was not "unduly stressful or pressured". Subsequently (see paragraph 18(c) of the Tribunal's Review Judgment) she suffered from a condition which caused anxiety, depression and lack of confidence, which were "barriers not only to employment generally but specifically in teaching", thereby indicating they were barriers to both. He expressed himself as unsure if, even with treatment which he thought appropriate, the Claimant's symptoms would improve so as to allow her return to the inevitable stress associated with employment as a teacher. As to the possibility of her returning to teaching, whereas he did not rule it out, he was guarded as to the possibility it might occur.

17. In the light of her condition, and relying on evidence from both a Mr McNaught, who was called by the Claimant as an employment consultant, and from the Claimant herself, her case was her return to teaching was unlikely to the point where it became a certainty that it would not happen. She had tried doing some work on a TEFL course. She explained to the Tribunal her reaction on considering a return to the classroom, which prevented her continuing

18. Unfortunately the way in which the County Council had behaved toward her effectively precluded her taking advantage of Local Authority employment generally.

19. Accordingly she argued that her teaching career, which she had intended would be a lifetime career, in her case she said to age 65, would no longer be open to her. She thought that she would have become a Deputy Head in the near future. She had been seeking the support of the school, which was denied her only because of the events which occurred, to obtain the NPQH success that would be a precursor at the time to applying for a Headship post or at least a post at a very senior level in management.

20. Instead, she submitted, she was reduced to lesser earnings. She produced 150 applications she had made for employment. She had succeeded in none, though three I am told were outstanding at the date of the Tribunal hearing. She had had a couple of short-lived and small jobs, of no great significance when forecasting future earnings.

21. A teaching post has and had at the time the benefit of a final salary pension scheme. Such a scheme calculates the pension on the most favourable of the last one or three years in employment. She would be bound, she said, if she was now to have a job at all to have one which would not be pensionable.

The Tribunal Judgment

22. The Tribunal, in its Review Hearing, reviewed the evidence and concluded that the Claimant would not work again as a teacher. It said at paragraph 37:

> **"… We were satisfied based on the evidence before us and our assessment of the claimant that her teaching career had come to an end and she would not return to teaching again in the future."**

23. It considered the evidence it had as to the career that she would have enjoyed in order to compare it with the jobs to which she was now restricted. In looking at the chances of the work she would have enjoyed had she remained as a teacher, the Tribunal concluded at paragraph 42 that within 18 months after 2008 she would have obtained an NPQH qualification. After that it would have taken three or four years to achieve appointment as a Deputy Head, and she would then have to wait another three or four years before applying for a Head Teacher post. As to the Head Teacher post, it thought it 50% likely that she would obtain such a post by 2018 and 100% likely by 2022. The paragraph in which it did so is central to many of the arguments. It reads:

> **"55. Doing the best we could with all the information we had we assessed that there was a 50% chance of the claimant obtaining a headship as at September 2018. By that time she would be aged 46. After this she would in our view have kept trying and would have been 100% certain of success by the age of 50 in her attempt to obtain a headship which is a role she would have continued in until retirement. We concluded that she would have retired at 65 whatever post she was in at the time which on our assessment would have been as a head teacher. She was ambitious and would have wanted to progress her career to headship which was her intention in 2004 so that by 2022 she would have been a deputy head for 10 years and would have had the relevant experience and qualifications and would in our assessment have had 100% chance of success at obtaining a headship by the age of 50. Our assessment took into account the difficulties schools were experiencing in filling these positions now and the likelihood that the situation in terms of recruitment in the future will not improve, and that if the claimant was unsuccessful in her first attempt she would have succeeded by the age of 50 given that this was the likely career path of her career if the discrimination had not occurred."**

It repeated the view (paragraph 57) that the Claimant would have continued her career for her lifetime until 65, noting:

> **"… She was a dedicated and committed teacher and it was a secure profession especially for someone with leadership responsibilities like the claimant. …"**

24. The earnings which she could now expect fell for assessment on a more modest basis. The Tribunal thought (paragraph 67) as follows:

> **"… We could assess residual earning capacity on a varying basis over the future loss period using a varying percentage basis but decided doing the best we could on a speculative basis to assess the claimant as working part-time for 6 years part-time (earning £47,220) [I hasten to add that is a total, not per year] and full time for 15 years (£196,575) which equates to an average wage each year of £11,609. …"**

25. It then applied a multiplier to it. Having adopted a multiplier and multiplicand approach for assessing the loss of teaching earnings, it did the same in respect of the alternative career. It used the same multiplier. Then it added, having stated the figure that give rise to:

> **"… which we discount by a further 20% … to take into account the various uncertainties that exist specifically in relation to the claimant's future employment prospects particularly because of the residual vulnerability she will be left the barriers and the difficulties in finding employment, which are likely to have an impact on her working life. …"**

In dealing with pension loss, it began by noting the parties asked it to use the third edition of the guidance *Compensation for Loss of Pension Rights*. That gave rise to the question whether a simplified approach or a substantial loss approach was more appropriate. It adopted the latter.

26. As to taxation, in order to deal with the award which it had calculated, the Tribunal set out the principle it adopted at paragraph 74:

> **"… The principles are clear and are not in dispute namely that the Claimant will be taxed upon those parts of this award which properly bear income tax within the year in which the payment falls due. We therefore have to calculate what sum needs to be awarded to the Claimant so that after payment of such tax as falls due, she is left with the sum to which she is entitled pursuant to this award."**

27. It considered that the award in respect of future loss of pension, calculated as I have indicated, was taxable. It then looked at the amount which it had awarded and worked out, band by band, what tax would be payable on that amount. I note, because I shall come back to this point later in dealing with the appeal, that in doing so the Tribunal was not calculating what sum needed to be awarded so as to leave £885, 754, the figure it then adopted, but was instead

asking what sum of tax would be payable on £885, 754. It is the Claimant's contention on the appeal that in doing so it fell into error.

The Grounds of Appeal: Preliminary Hearing

28. In realistic and careful submissions Mr Healy has dealt with a number of grounds of appeal. Helpfully he has grouped them under three headings: first, procedural unfairness; second, the application of the wrong legal test by the Tribunal; and thirdly, perversity.

29. So far as procedural unfairness is concerned, the essential complaint is that the Tribunal in the Review Decision adopted an approach to the quantification of loss of earnings that was neither argued for by the Claimant nor raised by the Tribunal with the Respondents in that it adopted a multiplier/multiplicand approach and so far as future loss of residual earnings were concerned, proceeded to make a further deduction of 20% from the figure when adopting that method. The Respondents had no opportunity to deal with either approach.

30. Secondly, it is argued that, in the course of the evidence, the Tribunal indicated that it would consider pension loss in two stages: first, it would make findings of fact in respect of the Claimant's future career to enable it to decide whether the substantial or simplified loss approach should be adopted and, having done that, then ask the two experts to prepare if possible a joint statement of the calculations which flowed from those findings. The complaint is that the Tribunal, in its Review Judgment, rolled up those stages and gave the parties its answer without first getting further input from the experts.

31. Thirdly, it is argued that the Tribunal did not explain why although the Respondent advocated a lump sum approach rather than a multiplier/multiplicand approach this had not been adopted.

32. In my view none of these grounds has any realistic prospect of success. First, and generally, they were matters which were open to and were advanced before the Tribunal at the Reconsideration Hearing. Accordingly they were matters which before any final binding decision as between the parties were reached was open to argument. This is not a case such as that of **Market Force (UK) Ltd v Hunt** [2002] IRLR 863 (see paragraph 12, page 864) in which a party simply had no opportunity to advance its arguments to the Tribunal. There was, therefore, in my view no procedural unfairness which was not in fact remedied.

33. However, the matter goes further. A Tribunal's task in assessing compensation for future loss of earnings is to apply the general principle with which I began this Judgment. It may do so by more than one method. A conventional approach, where there is a continuing loss over a period, is to adopt a multiplier/multiplicand approach. That enables a Tribunal to see what at first sight is the loss per year over the number of years which it is suffered and enables it, if appropriate tables are used, to adjust the resultant product to allow for the advantage to the Claimant of receiving all the money at once, instead of spread over a period, and also to allow for some of the inherent chances of life: life simply is not so predictable that the continuation of a settled salary for a settled and definitive period is inevitable. The degree to which losses are predictable or uncertain prompted the court in **Blamire v South Cumbria Health Authority**, a Court of Appeal decision reported at [1993] PIQR Q1, to hold a Judge entitled exceptionally to depart from the multiplier/multiplicand approach where the uncertainties were simply too great to permit of that process. To adopt the multiplier/

multiplicand approach would give rise to a spurious certainty (my words). In **Blamire** a lump sum award was made. As Balcombe LJ said, Q6:

> **"… there were far too many imponderables here for the judge to have been bound to take the conventional approach. …"**

He set out a number of those uncertainties in the passage which followed.

34. It is, in my view, therefore not necessarily wrong - and certainly involves no question of binding principle in most cases - that the court should adopt a multiplier/multiplicand approach or, for that matter, if it feels it appropriate, a **Blamire** approach. Though the latter is more likely to require justification than the former approach, much may depend upon the degree to which there are uncertainties. The loss of a settled and stable job in an employment which is familiar territory to the courts is more likely to attract the former approach rather than the latter, at least where the loss is ongoing over a period. The process is, however, one of assessment. An assessment should not easily be set aside unless the result is manifestly excessive or wrong in principle, and I see it here as being neither.

35. Similar points are to be made in respect of the choice between the substantial loss or simplified approach to pension calculations. At the outset of the appeal the court directed the advocates to the recent decision of the Court of Appeal in **Griffin v Plymouth Hospital NHS Trust** [2014] IRLR 962. In that case there was a successful challenge to the Tribunal's failure to use the substantial loss approach. The general considerations which apply to the two approaches are analysed helpfully from paragraph 54 onward by Underhill LJ. At paragraph 65 he identified guidance as to which approach to use and at paragraph 67 noted that paragraph 4.13 of the third edition of *Compensation for Loss of Pension Rights - Employment Tribunals* identifies general considerations affecting the choice of approach. He observed that it identifies

three factors which favour the use of the substantial loss approach: (1) the length of time the Claimant had been employed; (2) the stability of the employment; and (3) whether the employee had reached an age where he was less likely to be looking for new pastures. Underhill LJ noted that if those three factors had such a result they would all increase the likelihood that the employee would, but for the dismissal, still have been an active member of the pension scheme at retirement.

36. Those factors apply here. In the present appeal, it is obvious that the Claimant had been employed for ten years as a teacher, that the employment, being in the field of teaching, would be considered stable and that the Tribunal considered it so, and that the employee was, in the Tribunal's view, unlikely ever to be looking for new pastures. The Tribunal was unarguably entitled to apply the substantial loss approach. Indeed I note that in his own submissions to the Tribunal (at page 492 of my bundle, page 16 of his closing submissions) when discussing possible pension loss scenarios Mr Healy himself put forward a number of possibilities, the first three of which he thought would lead to the simplified approach being used and the last three to the substantial loss approach. The adoption of the latter rather than the former was dependent on whether the Claimant would return to work as a teacher, and the difference between each of the three scenarios was whether she would have remained a teacher, become a Deputy Head or become a Head Teacher. The finding of fact the Tribunal reached was she would now leave teaching and not return. If that finding is not itself appealable, it seems to me there is no basis upon which it can properly be said that the substantial loss approach should not have been adopted. The fact that it might have been possible for a forensic accountant and the Claimant's representative to have discussed figures is not, it seems to me, a principle of law which vitiates the Judgment. But in any event the Tribunal considered the matter and concluded (paragraph 9.1 of the Reconsideration Judgment) that the lengthy history of the case suggested to it that for

the experts to try to do so would not be productive and it was desirable for the case to proceed as it did. I cannot see that the Tribunal was not entitled to take that view.

37. As to the 20% deduction, the Tribunal explained why it had adopted that approach. Mr Healy points out that an effect of it would be to alter the multiplier from the 15.62 used to one of 12.5. He is right in that. However the question is not the effect but the entitlement of the Tribunal to come to that conclusion. It explained its reasoning, as I have recited above. It seems to me that the figure which it adopted was generous but not out of the range which it could permissibly adopt. It is not very different from the allowance which in common experience has been made by Judges dealing with the very significant uncertainties which may apply to Claimants in particular situations. Here the Claimant was in the North East. The Tribunal was well aware of the employment position in the North East. She would start, inevitably, with the disadvantage of not having worked remuneratively since she was made redundant in 2009, and it was at the time of the Tribunal's Decision already the end of 2013. She had made 150 applications for work without any significant take-up. She had the disadvantage that, if asked, she would honestly have to confess to a would-be employer that she had left her employment having suffered a psychiatric condition which had disabled her from work for some two to three years. She could not occupy a job which would be particularly stressful, at least at first. The employment consultant suggested she might begin by a series of part-time employments. The stability of any such employment must be contrasted with that of teaching. All of this would have been known without needing to be spelt out by the Tribunal.

38. Though speaking for myself, I think the figure reached is on the high side, I do not think that given that context it is so high as arguably to be excessive and therefore justify an appeal. There is no significant overlap between those figures which may demonstrate the risk of being

out of work for periods of time between jobs, and the discount factor normally to be applied in calculating the 15.62 multiplier. The award is a reflection of the difficulties the Claimant would face not only in getting but in keeping a job and obtaining any replacement job in the labour market, particularly as she grew older.

39. I turn, then, to the second category under which the appeal grounds are summarised. It is argued the Tribunal applied the wrong legal test. Underlying these complaints is a sense, articulated on behalf of the Respondent, that the Tribunal was doing more than merely compensating the Claimant, but was descending to punish the Respondent for its conduct toward her.

40. The issue for the Tribunal was and could only be a "hard matter of pounds and pence" as it was put in **Malyon v Plummer** [1964] 1 QB 330. But the Employment Tribunal went further. Thus at paragraph 65 the Tribunal commented that it was:

> **"… compensating her for loss of earnings for a significant period of time but the respondents in this case are the 'authors of their own misfortune' by cutting short the claimant's career in teaching. …"**

Although this might simply be a throwaway comment, Mr Healy argued that it should be taken together with paragraph 30, explaining how the Claimant might easily view the Respondents' conduct cynically, and paragraph 37, again of the Review Hearing, in which the Tribunal blamed the Respondents' witnesses for not producing evidence of opportunities available to the Claimant when that was really the Claimant's job and not theirs and noting, in one sentence:

> **"… More crucially at the time of the redundancy in 2009, the respondents have not assisted the claimant with redeployment at another school, when her chances of remaining in a teaching career would have been much greater rather than attempt a return to teaching 4 years later in 2013, when her health and her confidence had been damaged. …"**

41. I do not accept that these comments amount to a sufficient indication for any Appeal Tribunal to conclude that the Tribunal here was adopting an approach which was punitive as opposed to compensatory. My reason is that, on each of the occasions when the words were used, there was a justifiable purpose in using them. It was not simply an expression of outrage at the way in which the Respondent behaved. Thus at paragraph 30 what the Tribunal was looking at was the effect upon the Claimant of the way she had been treated. It was considering her injury to feelings. Those feelings would be influenced by her perception. Her perception, which the Tribunal thought reasonable and justified, was to view what the Respondents had done cynically. That, in my view, is not the Tribunal expressing its outrage at the employer but rather its view of that which the Claimant could reasonably have held, and was supportive of her claim in respect of injury to her feelings. Similarly in paragraph 37, one sentence is taken, as it seems to me, out of context but the whole must be looked at. The issue being considered there is the question of whether the Claimant would return to teaching. To do so would involve support by the Local Authority, as described in paragraph 37. There was no evidence that that was available or had been made available in the past. What has - or has not - happened is often the best indicator of what will - or will not - happen in future. That, I think, is the point being made.

42. The passage with which I began, that at paragraph 65, is in the light of my views generally properly described as a throwaway comment, as Mr Healy acknowledged it might be. I do not think it needed to be said, but I do not see that it throws any real reflection on the reasoning as a whole.

43. The overall award, it was suggested, was wrong in principle. This was because the total came to £47, 500 for injury to feelings. That is a high award. The highest bracket within

Vento within which this would fall should be reserved for the most serious cases where there is a lengthy campaign of discriminatory harassment: see **Da'Bell v NSPCC** [2010] IRLR 19. And regard should be had to the Guidelines for the Assessment of General Damages in Personal Injury Cases insofar as the psychiatric consequences were concerned.

44. One of the difficulties with this argument is that the £47,500 was a composite. £30,000 of it was an award for loss of injury to feelings as such. The other £15,000 amounted to awards for aggravated damages and for the effect upon the Claimant of the way in which the Respondent had conducted itself. So seen, £30,000 is toward the top of the range (though the **Vento** range has to be extended by reference to the passage of time since **Vento** was decided and reviewed) but not outside it. This award, however, compensates somebody who had her heart set on teaching, so far as the Tribunal was concerned, and who would not be able to work again in that capacity for the rest of her life. I do not see that an award falling just within the range, in circumstances such as these, could successfully be argued to be manifestly excessive, as it would have to be if it were to be properly appealable.

45. At ground 2.4 the Respondent complains about the approach which the Tribunal took to future loss of earnings. An assessment of future loss is necessarily predictive. There can be no absolute certainty. There are chances, one way and the other. It is well established that such chances may fall within a range running from a chance which is in effect non-existent (which may be put at 0%) to one which is a virtual certainty, as to which 100% may be ascribed. But both are likely to be extremes, the latter the more so. The point was well recognised in **MoD v Cannock** [1994] IRLR 509 at page 522, paragraph 124:

> **"There is many a slip between the cup and lip and Tribunals should be wary of assessing the chances of promotion on the high side. It is not a question of fact. It is a question of assessing the chances, applying the percentage figure to the higher pay. Again, it is not so much a**

question of evidence and whether it is challenged or of findings of fact, more a question of assessing chances."

46. The challenge in principle here is that, by adopting a 100% approach, the Tribunal was, in effect, adopting a balance of probabilities or absolute certainty approach, attempting to predict for itself what would be the future.

47. I have some difficulty with accepting that submission in those terms. That is because, inevitably, in an assessment of future loss, one way of indicating the balance between the certainties and uncertainties is to map out a proposed career path, which would be well known to be uncertain but which best represents a compromise between the various figures. It is exactly as Underhill LJ explained, in paragraph 9 of **Griffin**, when he said this:

> **"The tribunal considered the issue of future loss of earnings … After referring to various factors affecting the assessment it held that she was 'likely to obtain suitable alternative employment at 25 hours per week in a year's time'; and it awarded one year's loss of earnings … on that basis. At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of the probabilities. In *Wardle v Crédit Agricole Corporate and Investment Bank* [2011] IRLR 604, at paragraph 52 (p.610) Elias LJ said:**
>
> > **'… In the normal case, if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide.'**
>
> **It is, however, convenient to refer to it, as the tribunal did, as the date on which it was likely that she would obtain employment."**

48. All depends upon the particular exercise on which the Tribunal is engaged. This is one of assessing the chances. I do not see here, by its adoption of 100%, that the Tribunal was wrongly adopting the approach of looking at probabilities or certainties as such, as though that were the way to calculate future loss. It is possible that, in what it said as to 100% loss, the

Tribunal was balancing the chances. I shall, however, go on at this point to note that subsequently in his argument Mr Healy argued that it was perverse of the Tribunal to adopt 100% because of the uncertainties that were inevitable in this case. If the Tribunal is right to hold that a teacher who had taught for ten years and had had no promoted post would by the age of 50 have obtained a Head Teacher's post, this would require her first to become a Deputy Head, and it would have to be assumed that she had successfully won her spurs in that role. It would depend upon the extent to which there were vacancies. It would depend upon the calibre of the other applicants. It would depend upon personal factors affecting her, such as her own state of health as it might have been, the demands of her children, and for that matter her family life more generally. There are many choices which are made by people during the course of their life which cannot be anticipated with any certainty in advance.

49. It is on arguments such as this that Mr Healy argues that the Tribunal simply went too far by asserting a 100% chance. Though it might have had reason, it may be argued, for thinking that the chance was strong, he submits that it could not be said to be absolutely certain. I consider that this argument ought to be argued before a full Tribunal. It seems to me to have possibilities of success. It must be seen in context, but the finding is clear, and it may be that an Appeal Tribunal would think that it had not been sufficiently explained by the Tribunal below.

50. The argument goes on to suggest that the Employment Tribunal should have reminded itself of the rare nature of career-long losses in employment cases. It relies on **Wardle v Credit Agricole** [2011] ICR 129 at paragraph 50. This seems to me to be an argument on fact and not an argument of principle.

51. The failure to consider the **Blamire** approach was advanced. I have dealt with that.

52. As to the failure to appreciate that, as time passed, the prospects of a return to teaching increased and therefore a sliding scale of discounts should be introduced, this is an attack upon the Tribunal's conclusion that the Claimant realistically would not return to teaching. That finding was open to it. At a different part of his argument Mr Healy submits that neither Mr McNaught nor the consultant psychiatrist, Dr Mumford, could rule out the Claimant returning to teaching. Dr Mumford's views, however, were couched with very great uncertainty. The Claimant herself was clear that she would not return or be able to return to teaching, much as she would otherwise have wished to do so. That was evidence which the Tribunal was entitled to take into account. It had to form its own assessment. The Tribunal was entitled to take the view that a Claimant who had not taught for some years at the date of the Tribunal application save in the TEFL role, who was anticipating further treatment before a return to part-time work and perhaps some administrative work thereafter would be unlikely to return to teaching. For the time being, at any rate, she could not face a return to the classroom because of what had happened. The Tribunal might think it unrealistic that she should in due course surrender whatever job she might then have for what would be the inevitable uncertainties of seeing if a return to the classroom might then succeed, if indeed, by that stage, a school would wish to employ her. It seems to me the Tribunal's conclusion was one to which it unarguably was entitled to come and displays no error of principle.

53. That deals with ground 2.5. As to ground 2.6 this is a challenge to the Tribunal's assessment of the Claimant's chances of promotion. The chances were assessed in two stages: first, Deputy Head, then Head. It seems to me that the principles I have already expressed as to the proper approach in relation to the 100% chance of becoming a Head Teacher apply to the question of becoming a Deputy Head, and I see no reasonable prospect that the Tribunal's Decision as to that and its approximate timing, as a fair reflection of the evidence before it,

would be held to be beyond its entitlement. I have already indicated that I do see a 100% certainty of becoming a Head Teacher as arguable.

54. The next ground, 2.9 (neither ground 2.7 or 2.8 being pursued) suggests that there was an overlap between the award of £15,000 for loss of career opportunities made in the December 2008 hearing and the award made at the Review and Reconsideration Hearings in respect of future loss, such that one or the other should be reduced.

55. The first question for me as to this is the nature of the award which was made and the basis for it. The Tribunal expressed this in its Judgment of 18 December 2008. It took the view that because of what had happened the Claimant had suffered a setback to her career (see paragraph 8.2). It said:

> **"… She was an established and dedicated teacher. She had a good record of teaching, leadership experience, she wanted to progress her career, but for the statutory torts her career would not have been stalled in the way it was. It was difficult to assess what the financial compensation for that should be, but doing the best we could with the information we had we considered that an appropriate amount, was £15,000 (which equates to the difference in salary for a year between the claimant's salary and the headteacher's salary)."**

56. Any court approaching this on appeal would seek to understand what was being said here. To my mind it is clear. The Tribunal were in effect saying that the Claimant would, as a result of what had happened, no longer be promoted to the post she otherwise had a chance of reaching as early as she would have done. In compensation for that delay it took a figure which broadly represented a year at a Head Teacher's salary, it being her case that that is the position she ultimately would have achieved. If indeed her career was delayed by a year in reaching promotion, that would not be inappropriate.

57. That was the position as at 2008. The question then is whether, in the Review and Reconsideration Decisions, the Tribunal began with the 2004 incidents when assessing compensation, or began to assess the additional loss as from 2008. It seems to me unarguable that the latter is the case. That being so, it was already accepting that there had been the setback to the career of which the Claimant was complaining, which it accepted had occurred, and therefore there is no overlap between the damages. I understood, I hope accurately, that in submissions Mr Healy felt that, if the starting point was as I have described it, then the conclusions would follow.

58. At 2.10 the Respondent returns again to the question of the decision as to Deputy Head and Head Teachers. I merely repeat what I have already said in respect of those matters.

59. In ground 2.11 it is suggested that the Tribunal erred in its approach to residual earning capacity. It did not make the broad, sensible and fair assessment of the Claimant's likely future earnings it should have done because it made no allowance for the possibility of future promotion in the post which the Claimant would have. As to this, it seems to me that this would be regarded by any court on appeal as an over-focus upon individual items and aspects of the Judgment which would necessarily be broad-brush, as the Respondents' own statement of principle recognises. The Tribunal expressly recorded it as a speculative exercise (paragraph 67), in respect of which it nonetheless did its duty to assess the loss as best it could. It noted that it could have assessed loss using a varying percentage basis. This makes it clear that the Tribunal was actually doing its best in reaching a broad-brush conclusion to the question of what residual future earnings might be. It is not appropriate in respect of such reasoning to criticise the Tribunal for a failure to take separately into account that which almost

automatically was part and parcel of the assessment: that is, the prospects of increased earnings over time beyond the natural effects of inflation.

60. As to ground 2.12 (Pension Loss) it is argued that the 2013 Guidelines should have been adopted. They anticipate that a Claimant's salary, as at the date of dismissal, should be regarded as the starting point for any assessment of pension loss in the future. The Guidelines say that they do not make specific allowance for inflation, future career progression and so on since those are taken into account in the discount factors to be applied. However, all must depend upon the particular facts. I put to Mr Healy in argument what the position would be if it were certain that within three months of a dismissal or a wrong a Claimant would otherwise have been promoted as a certainty: would the pension be calculated upon the basis of the unpromoted salary or the promoted one? He indicated that, consistent with his argument, the former was the only conclusion he could reach. It seems to me that if a court knows what the position will be it would be artificial not to take that into account. If, for example, it is thought to be the case that the Claimant would be a Head Teacher as at the date of her retirement, and would have been so for the requisite time under the pension scheme (a year or three, whichever it may be), then her pension would under a final salary pension scheme be based, as the name suggests, upon those last year's earnings. Those promoted earnings are necessarily greater, when considering the appropriate figures at the time of calculation, than the unpromoted wage she would have been receiving at that date. I do not see, therefore, that this calculation is in error.

61. The only matter I would mention, however, is that if the Respondent succeeds in its appeal in respect of the 100% figure for the chance of becoming a Head Teacher and some other figure, for instance, is substituted, whether it be 75%, 80%, 90% or as may be, that would

have a knock-on effect upon the entirety of the pension calculation because the starting point would be less certain by the appropriate percentage, and accordingly the pension figure would then fall for review too.

62. The process of pension calculation begins, therefore, with what the Guidelines refer to as the current salary, as multiplied by the appropriate factor derived form tables, from which is to be deducted the value of accrued pension rights at the date of dismissal. This gives rise, it seems to me, to the second potential point of appeal. The Tribunal concluded that, in order to calculate the earnings from the pension scheme which had applied to her whilst a teacher, a pension to which she remained entitled, it should use a multiplier of 9.45. Mr Healy argues that it should have used one of 12.12 because the Claimant's "normal retirement age" was 60, not 65. The Tribunal approached the matter as if the Claimant's evidence that she would have worked on to 65, as she was entitled to do, would have affected not just the pension which she would otherwise have had, but also the pension to which she was already actually entitled. This ignores the fact that, if she was entitled to a pension which she could take at 60, in addition to whatever else she might be earning at the time in her residual earning capacity, she would be entitled to be paid that pension for five years between 60 and 65 and would not have to wait to 65 to start it. Consequently, he argues that the Tribunal should have used a multiplier of 12.12. It seems to me that this argument, though small in the overall scheme of things, may indicate a discrete error on the part of the Tribunal and seems to me arguable.

63. The next point was that the Tribunal had not allowed anything for the possibility that the Claimant might have a pension from the earnings she may yet earn. Since all employers are obliged to join what is known as the NEST scheme, due to be introduced, this should have been recognised by the Tribunal. In my view the Tribunal was entitled to apply the Guidelines as it

did. I am not satisfied that there is any sufficient argument here suitable for a Full Hearing of the appeal which detracts from the overall task here of the Tribunal in giving a fair, albeit broad brush assessment, of the Claimant's loss arising from the wrong done to her.

64. It is said that the Tribunal failed to consider withdrawal factors, that is the risk of the Claimant leaving her employment earlier than her projected retirement age. This is not a separate point. If the multiplier is properly calculated, it will take account of that risk, as will the reduction, if there be any, from 100% to some lower figure in light of factors such as I have identified which make me regard the 100% point as arguable.

65. Next, Mr Healy argues that the Tribunal was wrong to follow the decision in **Yorkshire Housing Ltd v Cuerden** [2010] UKEAT/0397/09/SM that an award for pension loss is taxable. He argues that **Cuerden** deals with a different section of statute. The response given, on what is an inter parties Preliminary Hearing, though I found it unnecessary to call significantly upon Mr Anderson, was to refer me to the case of **Moorthy v Commisioners for HM Revenue and Customs**, a decision of the First-tier Tribunal in the Tax Chamber, reported at [2015] IRLR 4, in which the Tribunal emphasised at paragraph 64 that section 401 of the ITEPA was a very widely drawn provision:

> **"This is a very widely drawn provision. Not only does it catch payments made directly in consideration of a termination, or directly in consequence of a termination, but indirect payments of either type, but is then further expanded to include payments which are not even in consideration or in consequence of a termination but '*otherwise* in connection with' a termination."**

66. It is well settled in employment law that pension is to be treated as deferred pay, that pension in payment is taxable and that therefore any sum paid in respect of a loss of that which would be taxable as representing deferred earnings is within the taxing statutes. I see no

problem with the Tribunal here following **Cuerden**. I do not see the difference in statutory section as relevant to the issue.

67. The Respondent complains that before finalising the Judgment the Tribunal did not look at the case in the round and consider whether the amount awarded was a sensible and just reflection of the various chances it had assessed. To my mind this is not a proper ground of appeal where the Tribunal has approached the task in the way which it did here.

68. The third category under which the grounds of appeal fell was perversity. I shall deal with this shortly. Perversity is a high hurdle. There has to be, in effect, no evidence upon which the Tribunal could rely, or a decision has to be so startling in its result that an observer would exclaim in astonished fashion. The point has been expressed in different terms in a number of authorities, which it is unnecessary for me to repeat here. The findings attacked at 3.21 were the additional injury to feelings award of £15,000. In my view this was plainly an additional award consequent upon the redundancy, the additional feelings which it caused and the additional injury. There is no prospect of that being regarded as perverse. Whatever one may say about the award, it was within the entitlement of the Tribunal to make it. The Tribunal's conclusion that there was no chance of the Claimant returning to teaching is one within the entitlement of the Tribunal to make, as I have indicated. It did not have to follow the evidence of Dr Mumford and of Mr McNaught that they would "not rule out" the prospect of a return to teaching. The Tribunal was entitled to, indeed bound to, rely upon its own experience and assessment.

69. The other items I can deal with comprehensively without descending to detail in which in what is already too overlong a Judgment, With the exception of the argument in respect of

the 100% chance of the Claimant becoming a Head Teacher by aged 50, the various matters referred to are not matters which would properly pass the hurdle of arguability.

Conclusions

70. On the Preliminary Hearing it follows that I consider that no ground has any realistic prospect of success, save two. I refer to them as two grounds although each has a life under the separate headings. In particular the central ground is the argument that the Tribunal was not entitled, either as a matter of principle or on the evidence, it being perverse to do so, or a matter of failing properly to explain, to decide that the Claimant would inevitably have become a Head Teacher at the age of 50 and maintained that Headship all the way through to the age of 65. To that extent there is room for argument that the assessment in respect of future loss was wrong. The second argument is the lesser point in respect of the multiplier in respect of the pension which would in any event be payable to the Claimant and whether too modest a multiplier was adopted given the principles which the Tribunal were applying.

The Claimant's Appeal

71. The Claimant's appeal, for which she had leave, focuses on the approach which the Tribunal took to the question of grossing up at paragraph 74 (set out above). The Claimant argued on the application for reconsideration that the effect of that was actually to produce in her hand, after taxation, a figure less than the Tribunal thought was full and proper compensation. The Tribunal did not accept that argument. It did so because:

> **"… The Tribunal agreed with Mr Healy that it was difficult to understand what the claimant's argument was to justify a further grossing up of the already grossed up award. Mr Falkenstein [he then being counsel for the claimant] was unable to provide any further clarification at the hearing. …"**

On that basis it maintained its original approach to grossing up. That had been, as I have indicated, to take each of the taxable heads it had identified and ask whether, if that sum were paid, what the tax would be in respect of it.

72. The problem with that approach may be shown by this simple example. Suppose that a Claimant is entitled to be paid £80 and suppose, for the sake of ease of calculation and demonstration, that the marginal tax rate applicable to that sum is 25%. If one asks what the tax would be on the £80 once paid, the answer would be £20, that being 25% of £80. The total would be £100. The payment thus made by the Respondent, assume, would be £100, in order to satisfy a debt of £80. The payment actually made to the Claimant in this example, upon which tax is due to fall, is not £80. It is £100. It is that sum which is taxable. If tax at 25% is applied to the £100, the result is to leave £75. That is £5 less than the £80 to which the Claimant in my example is entitled. That demonstrates the error in taking this approach. It also demonstrates the error into which the Tribunal fell. Having, in my view correctly (and that view is not dissented from by counsel) set out the applicable principle at paragraph 74 of its Review Judgment, the Tribunal did not in fact calculate the sum (in respect of the amounts which were taxable) which when taxation was applied to it at the appropriate rate would equal the total figure of compensation it had awarded. Instead it asked what tax ("T") would be payable by the Claimant if a sum equal to the total compensation ("C") was paid to her, and added the amount of the tax to the intended award ("T + C"). Tax would be paid on that. The result would be similar to the reduction to £75 from the £80 which my homespun example used. The result would be less than the sum the Tribunal thought was appropriate, which was the sum paid free of (i.e. after) tax.

73. The Tribunal simply did not apply its own principle. I understand from what Mr Healy submits to me that in *Harvey on Employment Law* a similar example to that which I have given is set out in the text. He understood the point being made. He argued, notwithstanding, that the appeal was out of time since the reasoning was that of the Review Judgment. The appeal is against the Reconsideration Judgment. However, it is plain that the reasoning in the Reconsideration Judgment and the reason for its refusal to reconsider its conclusion on this point adopts the fallacy which I have identified. The appeal will inevitably succeed.

74. As a matter of principle, whatever the sum payable to the Claimant may be, the taxable elements of it require to be grossed up not by applying the tax due on those elements in addition, but by assessing what sum will, when subject to taxation, produce that amount. It follows that there will be a hearing of a full appeal.

75. Two further matters remain, therefore. The first is to deal with 2.1 of the Notice of Appeal, which is that the Tribunal should not have dealt with what might be called general damages for the award for injury to feelings, and compensation for that bearing in mind that the Claimant has an outstanding claim yet to be resolved for victimisation following her being made redundant. It must be plain, first, that any question of overlap of any sum to be awarded in that case, if any is, with the sums awarded in this case is, it seems to me, a matter for the Tribunal hearing that case. If the Claimant succeeds, as in consequence of this Judgment she will have done subject only to the Head Teacher point, in obtaining a lifelong loss of earnings, it must follow that there will be no financial consequences in respect of the second claim, and the only possible heads of claim will be those in respect of any further injury to feelings. The Tribunal here dealt with the question of injury to feelings upon the basis of the original claim in these proceedings. My reading of this Decision is that it awarded the damages it did in addition

to those it had first awarded because it had expressly made the earlier award in reliance upon assurances as to the Respondents' behaviour which turned out to be erroneous. That being so, it was open to it to revisit the question of overall compensation.

76. The Tribunal, as it seems to me, looked to identify the cause of the injury to feelings with which it dealt. The evidence was that it was a consequence of the earlier wrong done to her. It may be useful to the Respondents for me to indicate that, insofar as the redundancy itself gave rise to any further injury, as plainly it did, it has been compensated for in this case by the Tribunal as a consequence of the earlier wrong done to her. It would not fall for any separate compensation, as it seems to me, however great or small any additional award for injury to feelings may be should her outstanding claim in respect of victimisation succeed.

77. I do not read this Decision as being one which impermissibly makes awards in respect of findings which have not yet been made by a Tribunal in respect of any wrong. It is limited to, and must necessarily be seen as limited to, the original wrongs done, complained of, compensated and in which that compensation was revisited in the light of the continuing consequences of the original acts.

78. Accordingly, as it seems to me, the Tribunal was entitled to take the approach which it did.

Conclusions

79. The Claimant's appeal is allowed insofar as it relates to the approach taken to grossing up. The parties must be prepared in due course to adjust the award in the light of this Judgment. The Respondent's appeal is permitted to proceed to a Full Hearing on the "100%"

point, the multiplier in respect of the value of the currently accrued pension to be offset against future pension loss, and those aspects of compensation (including the pension multiplicand) which may need to be adjusted if any alteration is made to the percentage chance that the Claimant would have become a Head Teacher in the future had she not been victim to the wrongs done her by the Respondents.